Filed 10/20/04 Dept. of Transp. v. Sierra Lakes Land Co. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,

Plaintiff and Appellant,

v.

SIERRA LAKES LAND COMPANY,

Defendant and Respondent.

E033494

(Super.Ct.No. SCV 53553)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the Los Angeles Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Bruce A. Behrens, Chief Counsel, David R. Simmes, Deputy Chief Counsel, Alexander F. DeVorkin, Stephen M. Chase, and Robert W. Vidor for Plaintiff and Appellant.

Rutan & Tucker, David B. Cosgrove, and Douglas J. Dennington for Defendant and Respondent.

1. Introduction

This appeal from an eminent domain judgment involves about 40 of 100 acres of unimproved land in northern Fontana, owned by Sierra Lakes Land Company (Sierra Lakes) and condemned by the State for construction of the freeway extension of Interstate 210/State Route 30.

The State challenged three sets of evidentiary rulings by the court. The rulings involved the State appraiser's theory of assemblage, used to calculate zero severance damages; the State appraiser's proposed valuation testimony regarding severance damages based on a temporary drainage easement; and the condemnee's appraiser's use of parcels of three acres or less in calculating severance damages.

The standard of review in eminent domain proceedings is abuse of discretion.[1] We uphold the trial court's discretionary rulings and affirm the judgment.

2. Factual and Procedural Background

Given that the parties' briefs fully supply the history of this case, a detailed recitation of the facts is not required. We provide the following summary and will refer to pertinent additional facts when necessary.

The subject property is part of the 700-acre Sierra Lakes Master Planned Golf Community. The 100 southern acres -- bordered on its perimeters by Citrus Avenue on

---

[1] *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1027, citing *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815.

the west, Sierra Lakes Parkway on the north, Sierra Avenue on the east, and Highland Avenue on the south -- were designated for commercial development.

In 1998, the State filed a complaint condemning 40 of the 100 acres to help complete the eastern extension of the Interstate 210/State Route 30 freeway. The complaint described three parcels. Parcel 15526-1 was the fee taking of 40 acres for the freeway. Parcel 15526-2 was a drainage easement located on the northern boundary of Parcel 15526-1. Parcel 15526-3 was a utility easement located on the eastern boundary of Citrus Avenue and is not at issue here.

By stipulation, the parties agreed that May 1, 1999, was the date of valuation.[2] As of that date Sierra Lakes had received various approvals for a planned community, including a golf course, homes, and commercial development. Some approvals were still required for the commercial component. The specific plan had two alternatives, one which included the freeway extension and one which did not. Rough grading for development had begun.

In January 2002, before trial, the State agreed to abandon its condemnation of Parcel 15526-2, the permanent drainage easement, and to accept the grant of a temporary drainage easement in exchange for consideration as agreed to by the parties.

The court decided three pretrial motions in limine. It ruled the State could not present assemblage evidence or any evidence regarding amendments of the Sierra Lake

---

[2] Code of Civil Procedure section 1263.110 et seq.

specific plan after the valuation date of May 1, 1999. The court also ruled the State could not present evidence regarding the drainage easement. Finally, subject to a limiting instruction, the court allowed Michael Waldron, the appraiser for Sierra Lakes, to use evidence of comparable sales based on parcels less than three acres in size.

Waldron testified that total just compensation for taking the property was $14,300,000. The State's appraiser, Fran Mason, testified just compensation was $4,113,000. The jury awarded just compensation to Sierra Lakes of $10,919,146. The court awarded litigation expenses to Sierra Lakes of $705,240.15.

3. Post-Valuation Date Evidence

The State wanted to prove Sierra Lakes had zero severance damages because it had adopted or could adopt an alternative development plan either by converting some of its planned residential development into commercial development or by acquiring adjoining property by assemblage and, thus, replacing the lost commercial property.

The trial court said "no" quite emphatically for the following reasons: "The Law Revision Commission comment to Code of Civil Procedure [section] 1263.440 makes it clear that it is the value of the remainder in the before condition, compared to the after condition, that is to be used as the basis for computing damages and benefits caused by the project. Resort to events taken subsequent to the date of value, and quite possibly in response to the project itself, violate these statutes and would introduce an impermissible element of project influence in the valuation, which is prohibited by Code of Civil Procedure [section] 1263.330.

"In addition, the State's valuation witness will not be permitted to testify to any likelihood of assembly of the subject property with other property as of the date of value. The deposition testimony lodged with the Court, and appraisal materials from Ms. Mason's analysis entered into evidence, do not show sufficient examination of or reliance on assemblage to serve as an appropriate foundation for introduction of such testimony at trial before the jury, again under Kennemur.[3] Moreover, the offer of proof by Defendant was that any such assemblage required release of adjacent property from an option with a third party, which was never identified nor considered by Ms. Mason. Under Evidence Code [section] 352, therefore, any probative value of testimony regarding such potential assemblage by Ms. Mason is outweighed by countervailing factors."

To counter the trial court's ruling excluding evidence of any amendment or alteration of the specific plan after the valuation date, the State relies upon *Saratoga Fire Protection Dist. v. Hackett*,[4] holding that in some circumstances, such as when there is a swiftly-rising real estate market, a condemnee should be allowed to present evidence of an increase in value between the valuation date and the trial date.[5] *Hackett*, however, does not apply in the present case in which there is no issue involving a rapidly escalating

---

[3] *Kennemur v. State of California* (1982) 133 Cal.App.3d 907.

[4] *Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895.

[5] *Saratoga Fire Protection Dist. v. Hackett, supra,* 97 Cal.App.4th at page 906.

market. Sierra Lake may have amended its development plan to accommodate the condemnation but that should not mean it loses its claim to severance damages sustained because of the taking.

Regarding assemblage -- the possibility Sierra Lakes could acquire adjoining property for commercial development -- the State relies on *People ex rel. Dept. Pub. Wks. v. TeVelde*,[6] holding that "the prospective joinder of the severed property with other land is one of the factors which a valuation witness properly may consider to determine market value of the remaining property both before and after severance from the part taken, and thereby to express an opinion as to the amount of severance damage, if any. The same factors should be used in determining the market value of the remainders in the before condition and in the after condition as well as for determining the value of the part taken."[7]

In the present case, however, we must defer to the trial court's determination that insufficient foundation allowed the State's appraiser to testify about assemblage. Mason had some general knowledge about Sierra Lakes's plans to accommodate the condemnation by changing its specific plan and adding other property for commercial development. But Mason also testified she did not base her valuations on any amendment to the specific plan or the addition of other property.

---

[6] *People ex rel. Dept. Pub. Wks. v. TeVelde* (1970) 13 Cal.App.3d 450.

[7] *People ex rel. Dept. Pub. Wks. v. TeVelde, supra,* 13 Cal.App.3d at page 455.

The remainder property in this case is not like the *TeVelde* property, which because of its irregular shape was not usable unless assemblage occurred. Furthermore, the present case differs from *TeVelde*, in which evidence of assemblage was received at trial without objection.[8]

We therefore affirm the trial court's ruling prohibiting evidence of an amendment to the specific plan or of assemblage.

4. Drainage Easement

As previously noted, the State's original condemnation, as identified in the resolution of necessity and the complaint, included a permanent drainage easement. But the State abandoned its condemnation of the permanent easement in exchange for Sierra Lakes granting a temporary drainage easement for as long as 10 years. The State and Sierra also agreed to a formula as compensation for the temporary easement.

In its pretrial motion in limine, Sierra Lakes argued that no evidence could be presented regarding the value of the temporary drainage easement. It is not disputed that the parties agreed, separate from the condemnation proceedings, as to the value of the temporary easement. Instead, the State contended it should be able to present evidence of the effect of the temporary drainage easement on the value of the remainder property, particularly that Sierra Lakes might be able to develop the remainder property more quickly. The trial court ruled against the admission of any evidence regarding the

---

[8] *People ex rel. Dept. Pub. Wks. v. TeVelde, supra,* 13 Cal.App.3d at page 453.

temporary drainage easement, either its value or its effect on the value of the remainder property.

Such evidence was properly rejected because the proposed expert opinion was offered belatedly. It was also speculative and cumulative expert testimony.[9] Although this case was filed in 1998, the State's inchoate theory about the effect of the temporary easement on the value of the remainder was not introduced until July 2002 after discovery was completed and shortly before trial began in September 2002. The State's theory was also cumulative of other testimony offered by Mason about how quickly Sierra Lakes would be able to develop the property because of the freeway.

Additionally, because the State abandoned its condemnation of the permanent easement and the parties had agreed about the value of the temporary easement, the State could not attack the value of the remainder by posing the existence of the temporary easement as constituting a benefit to the remainder. Code of Civil Procedure section 1263.430 provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken." But that section does not apply here because, ultimately, there was no "taking" by the State of the drainage easement. Instead, the State accepted the

---

[9] Code of Civil Procedure sections 1258.010 through 1258.290; Evidence Code section 352; *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565; *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 Cal.App.4th 988, 992-994; *Kennemur v. State of California, supra,* 133 Cal.App.3d at page 918.

[footnote continued on next page]

temporary easement as a substitute. Because the drainage easement was not part of the condemnation action, it could not properly be considered as part of the damages calculus, either directly or because of its impact on the remainder.

We acknowledge Sierra Lakes's further argument about the temporary easement constituting a lesser interest that improperly contradicted the scope of the taking as defined by the resolution of necessity.[10] But that principle does not apply here because, as already stated, the drainage easement was not, finally, a subject of the condemnation action.

The trial court did not abuse its discretion in precluding evidence about the existence or value of the temporary drainage easement and its effect on the remainder.

5. Comparable Sales

To establish the value of the condemned property, Waldron used sales data on 15 properties greater than three acres. He indirectly used data on 13 properties of three acres or less to assess severance damages.

The State moved to exclude the evidence of sales data of the latter on the grounds that the properties were too small to be comparable. More specifically, on appeal, the State complains that actual prices of the smaller parcels were admitted when the evidence should have been limited to a comparison of percentages.

[footnote continued from previous page]

[10] *Coachella Valley Water Dist. v. Western Allied Properties, Inc.* (1987) 190 Cal.App.3d 969.

[footnote continued on next page]

The trial court denied the State's motion, ruling that "differences in size alone do not render sales non-comparable as a matter of law" and citing Evidence Code 816. The court recognized that Sierra Lakes's appraiser meant to use the small properties indirectly to show severance damages, particularly "to demonstrate the enhanced value of corner properties and the corner opportunities on the property, to show demand for commercial sites generally, and as a type of 'matched pair' analysis to attempt to illustrate market treatment of various characteristics of the property . . . ." It ruled the evidence could be presented subject to a limiting instruction. We hold the court did not abuse its discretion.

About comparable sales, Evidence Code section 816, first enacted in 1965, states: ". . . the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued." The trial court is accorded wide discretion in applying these standards.[11] Furthermore, "[o]nly where it is clear that the court has abused this discretion by not adequately heeding the safeguards

---

[footnote continued from previous page]

[11] *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 678; *Los Angeles etc. School Dist. v. Swensen* (1964) 226 Cal.App.2d 574, 583; *Community Redevelopment Agency v. Henderson* (1967) 251 Cal.App.2d 336, 341.

for determining comparability will the appellate court reverse."[12]

Size is not the only factor signifying comparability: "Consequently, it has been held that transactions in property of smaller sizes are not *per se* noncomparable."[13] None of the prerequisites of comparability are entitled to special precedence: "[A]ll must be considered, where possible, in combination."[14]

Courts have often upheld valuations based on properties of disparate sizes. In the 1965 case of *People ex rel. Dept. Pub. Wks. v. Silveira*,[15] the court allowed sales of one acre or less to be used as comparable sales to property of 260 acres. *Silveira* relied on the earlier case of *Covina Union High School Dist. v. Jobe*,[16] "where the property in other sales, all of recent date, ranged in size from 1 per cent to 6 1/2 per cent of the size of the property condemned and where there was no sale of property of the size of that condemned. The [*Jobe*] court said: 'The judge at the time when the question came up for discussion in the trial said in effect that size alone was not the determining factor. The smaller sales could have shown the adaptability of the defendant's property for

---

[12] *City of Ontario v. Kelber* (1972) 24 Cal.App.3d 959, 970.

[13] *City of Ontario v. Kelber, supra,* 24 Cal.App.3d at page 971, citing *People ex rel. Dept. Pub. Wks. v. Silveira* (1965) 236 Cal.App.2d 604, 622-624.

[14] *Community Redevelopment Agency v. Henderson, supra,* 251 Cal.App.2d at page 341.

[15] *People ex rel. Dept. Pub. Wks. v. Silveira, supra,* 236 Cal.App.2d at pages 622-624.

[16] *Covina Union High School Dist. v. Jobe* (1959) 174 Cal.App.2d 340.

[footnote continued on next page]

subdivision, a trend of market value, a trend of the development in the area and various other things which would be of advantage to a prospective buyer. . . . We should not assume that the trial court abused its discretion. In fact the rule is exactly the opposite. [Citations.] There can be no absolute formula or definition of what constitutes similar or like property. Certainly, similar does not mean identical. It appears to us that the determination must vary with each particular case. . . .' [Citation.]"[17] Differently-sized properties were also allowed to show comparable sales in *City of Ontario v. Kelber*.[18]

Finally, the California Supreme Court has permitted differently-sized property to show comparable sales: "We have never declared properties noncomparable per se merely because they differ in size or shape. On the contrary, the trial court's obligation, pursuant to section 816, is to determine whether the sale price of one property could *shed light* upon the value of the condemned property, notwithstanding any differences that might exist between them. If it resolves that question affirmatively, it can admit the evidence. The jury then, on the basis of all the evidence, determines the extent to which any differences between the condemned property and the comparable property affect

---

[footnote continued from previous page]

[17] *People ex rel. Dept. Pub. Wks. v. Silveira, supra* 236 Cal.App.2d at pages 623-624, citing *Covina Union High School Dist. v. Jobe, supra,* 174 Cal.App.2d at pages 349-350.

[18] *City of Ontario v. Kelber, supra,* 24 Cal.App.3d at pages 971-972.

their relative values."[19]

The record establishes the trial court based its ruling on sound reasons why the smaller lots would shed light on the value of the severance damages. One example is Waldron's use of the smaller properties to perform a "matched pair" analysis and determine that a property lost 37 percent of its value when it changed from a corner to an interior location. Another example was a 29 percent discount due to a change in access. Overall, Waldron concluded the remainder property suffered a 30 to 35 percent discount from the taking of the primary parcel. Waldron did not directly or by implication use the prices from the small sales to establish the value of the taking or the remainder. Therefore, we hold the trial court did not abuse its discretion and give us cause to overturn its ruling.

6. Disposition

We affirm the judgment and order Sierra Lakes as the prevailing party to recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Ward
J.

---

[19] *City of Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 482.